(3)

No. 96-827

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT

1. This case is about whether petitioner Crawford-El, a long-time prison inmate and experienced *pro se* litigator, can maintain a lawsuit in federal court seeking damages from a prison administrator personally. He alleges that Ms. Britton, an administrator at the District of Columbia's facilities at Lorton, Virginia, violated his constitutional rights when Crawford-El was being transferred through a series of institutions, by entrusting several boxes of Crawford-El's possessions--legal papers and some clothing--to his brother-in-law (who happened to be a guard at Lorton), rather than shipping them to his ultimate destination, a federal prison in Florida.

The brother-in-law gave the boxes to Crawford-El's mother, who mailed them to him in Florida. He received the boxes after a several-month delay (some of which was caused by his insistence that the boxes be returned to Lorton for shipping by the prison). See 93 F.3d at 845; Pet. App. at 74a) (Henderson, J., concurring). His injuries were the cost of postage (for which he reimbursed his mother), costs of replacing some shoes and underwear, and mental suffering.

Ms. Britton filed an affidavit stating that she gave Crawford-El's boxes to his brother-in-law to minimize the risk of loss. 93 F.3d at 828; Pet. App. at 32a. Crawford-El alleges that she did so to punish him for his previous exercise of First Amendment rights.[1/]

In the years before the alleged "diversion" of his boxes, Crawford-El had helped many prisoners file administrative grievances (93 F.3d at 826; Pet. App. at 29a), and he had been responsible for two front-page stories in *The Washington Post* about prison conditions; one in 1986 and one in 1988 (*id.* at 822; Pet. App. at 29a-30a). He had also brought a series of constitutional cases challenging a variety of prison policies. See 93 F.3d at 827; Pet. App. at 30a. See also 93 F.3d at 844, n.1, Pet. App. at 72a (listing cases and noting that all were found to be without merit).

Crawford-El alleges that Britton gave his boxes to his brother-in-law, rather than having them mailed to his ultimate destination, to punish him for this protected activity. Judge

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[1/]This allegation was belatedly added to this case on its first trip to the D.C. Circuit. See 951 F.2d at 1316; Pet. App. at 147a. Prior to that time, his federal claim was that Britton intended to impair his access to the courts in the future, rather than to punish him for what he had done in the past. *Id.*

Williams noted that "transfer of the boxes to the brother-in-law makes an awkward fit with any serious purpose to keep them from Crawford-El." 93 F.3d at 828; Pet. App. at 33a. Crawford-El's best proof that this was done to punish him was that, in 1986, more than three years prior to this 1989 "diversion", in anger at Crawford-El for having duped her into permitting a reporter to visit him, Britton said to him that she would make life hard for him.[2/] Judge Ginsburg pointed out that the probative force of that allegation was substantially nullified, not only by the years that had passed since the alleged statement, but also by the fact that he was not singled out for such "diversion" of property; at the same time, Britton was also directing the property of other prisoners to their relatives. 93 F.3d at 843; Pet. App. at 70a.

2. The Court of Appeals for the District of Columbia Circuit considered this case *in banc* to determine the proper pleading and summary judgment standards for resolving cases where a plaintiff brings a claim for damages against a government official personally that turns on the official's motive, and the official asserts a qualified immunity defense. The problem arises from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Prior to *Harlow*, an official accused of a constitutional violation in the course of performing a discretionary function within the sphere of his official responsibility was immune from personal liability unless *either* he knew or reasonably

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[2/]The uncorroborated allegations concerning this alleged incident were first made in this action after the District, relying on the D.C. Circuit's then-new decision in *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *affirmed on other grounds*, 500 U.S. 226 (1991), first made the argument that his claim had to be supported by direct, rather than circumstantial, evidence.

should have known that his conduct would violate the plaintiff's constitutional rights *or* he took the action with the malicious intention of causing constitutional injury. *Id.* at 815. In other words, the immunity defense had both an objective and a subjective component. *Harlow* reformulated the standard to eliminate the subjective component. Henceforth, an official was to be immune from personal liability if his conduct was objectively reasonable as measured by clearly established law: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.[4] The defense could no longer be defeated by "bare allegations of malice." *Id.* at 817

The reason for this reformulation was that "it is now clear that substantial costs attend the litigation of the subjective good faith of government officials." *Id.* at 816. Subjecting government officials to potential monetary liability always entails costs such as "distraction of officials from their governmental duties, inhibition of discretionary action and deterrence of people from public service." *Id.* at 816. In addition, however, "[t]here are special costs to 'subjective' inquiries ...." *Id.* Those costs are the "burden of broad-reaching discovery" and the "costs of trial." *Id.* at 817-818. In cases requiring "[j]udicial inquiry into subjective motivation," "there is often no clear end to the relevant evidence." *Id.* at 817. Therefore, "[i]nquiries of this kind can be peculiarly disruptive of effective government." *Id.*;

[4]However, "in extraordinary circumstances," an official would also be entitled to qualified immunity if he could prove that he neither knew nor should have known of the relevant legal standard." *Id.* at 819.

footnote omitted. Further, "questions of subjective intent . . . rarely can be decided by summary judgment." *Id.* at 816. Accordingly, "[t]he subjective element of the [qualified] immunity defense has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial." *Id.* at 815-816. It was to avoid these special burdens of discovery and the trial of insubstantial claims that the Court reformulated the defense of qualified immunity in objective terms: "[w]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burden of broad-reaching discovery." *Id.* at 817-818.

However, there are constitutional torts that turn entirely on whether the defendant acted with a proscribed motive. This case involves one of them. The constitutionality of respondent Britton's action (assuming that it has caused a significant injury) depends entirely on whether she routed Crawford-El's boxes via his brother-in-law to punish him for his exercise of rights protected by the First Amendment. The question in such cases is how the objectives of *Harlow*--avoiding the discovery and trial burdens ordinarily entailed where there is judicial inquiry into subjective motivation--can be met. The opinions below represent the *in banc* court's collective judgment as to the most appropriate answer.

3. As Judge Edwards points out (93 F.3d at 847; Pet. App. at 78a), a clear majority of the D.C. Circuit agrees that in such motive-based constitutional tort cases, qualified immunity should be asserted and resolved on summary judgment. See 93 F.3d 823, 824-825; Pet. App. at 22a, 24a-25a (plurality opinion); *id.* at 838, 842; Pet. App. at 58a, 65a (Ginsburg opinion); *id.* at 847; Pet. App. at 78a (Edwards opinion). See also 93 F.3d at 834, Pet. App. at 46a (Silberman opinion) (test depends on defendant official's

assertion of reason for challenged conduct). Furthermore, while the various opinions below take different approaches as to the standards and procedures by which a properly asserted claim of qualified immunity should be resolved, we believe that they yield two holdings that the district court in the Circuit must treat as governing. The first is that, in order to defeat a claim of qualified immunity in a case that turns entirely on the defendant's motive, the plaintiff must establish the proscribed motive by clear and convincing evidence. 93 F.3d at 821-823; Pet. App. at 16a-18a (Williams' opinion). The second is that the plaintiff is not entitled to discovery in order to carry this burden unless he can also show, through the evidence he has in hand, that there is a "reasonable likelihood" that the discovery he seeks will "support his specific factual allegations concerning the defendant's motive" and, that, so supported, his evidence will meet the clear and convincing standard. 93 F.3d at 841; Pet. App. at 63a-64a (Ginsburg opinion).

a. The opinion for the court was authored by Judge Williams. He formulates the principle that, in motive-based constitutional tort cases where the defendant asserts qualified immunity, to defeat a motion for summary judgment, the plaintiff must present evidence which clearly and convincingly establishes that the official acted with the proscribed motive.

Judge Williams starts from the premise that an appropriate resolution of the problem must balance the interest in providing plaintiffs with a damages remedy against officials who violate their constitutional rights, on the one hand, against the costs to effective government described in *Harlow* -- namely, discovery that is "peculiarly disruptive" of government and the necessity of trying insubstantial claims -- on the other. 93 F.3d at 819, 821-822; Pet. App. 12a-13a,

16a-21a. He points out that, without some adjustment of the standards and procedures ordinarily employed, litigation over an official's motives will create the very burdens and costs *Harlow* sought to avoid. *Id.* at 821; Pet. App. at 17a.

Judge Williams also points out that, when ordinary rules of litigation have been found to threaten important policies, a standard judicial response has been to adjust the burden of proof that applies. *Id.* at 822; Pet. App. at 18a. An adjustment employed in a variety of circumstances is to require clear and convincing evidence. *Id.* Indeed, Judge Williams notes that in establishing such a clear and convincing burden of proof in defamation cases against public figures, *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-286 (1964), explicitly drew upon the reasoning of *Barr v. Matteo*, 360 U.S. 564 (1959). *New York Times Co. v. Sullivan* "recited *Barr's* entire litany of social costs of officer liability--essentially those later invoked in *Harlow*--as a parallel justifying the adoption" of a clear and convincing standard of proof. *Id.* at 823; Pet. App. at 21a. If a clear and convincing burden of proof is appropriate in public figure defamation cases, it is equally sound for personal damages cases against public officials involving motive-based constitutional torts. *Id.*

Judges Ginsburg and Henderson specifically concurred in this ruling on the clear and convincing burden of proof standard. See 93 F.3d at 838, 839; Pet. App. at 58a (Ginsburg opinion); *id.* at 844; Pet. App. at 72a) (Henderson opinion). As Judge Williams notes, however, Judge Ginsburg's opinion is controlling on the discovery question. 93 F.3d at 829; Pet. App. at 32a.[4/]

[4/]Relying on *Harlow's* teaching that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed," 457 U.S. at

(continued...)

b. Judge Ginsburg would permit a plaintiff discovery to meet the defendant's motion for summary judgment on qualified immunity grounds, but only where the plaintiff can show that the discovery he seeks is 1) reasonably likely to produce evidence to support his specific factual allegations regarding the defendant's impermissible motive, and 2) his allegations, supported by the evidence he will likely discover, will establish impermissible motive under the clear and convincing standard. 93 F.3d at 841; Pet. App. at 63a-64a.

c. Judge Silberman, writing only for himself, urges a different approach.[5/] However, while Judge

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[5/](...continued)
818, Judge Williams would not permit a plaintiff to engage in discovery to oppose a defendant's assertion of qualified immunity: "plaintiff cannot defeat a summary judgment motion unless, prior to discovery, he offers specific, non-conclusory assertions of evidence, in affidavits or other materials suitable for summary judgment, from which a fact-finder could infer the forbidden motive." 93 F.3d at 819; Pet. App. at 13a.

Judge Ginsburg rejects this absolute preclusion of discovery because, in his view, it would undermine too greatly the deterrent effect of constitutional tort damages actions. 93 F.3d at 840; Pet. App. at 61a.

[5/]He, too, would require that a defendant state a reason for the conduct challenged. But thereafter Judge Silberman urges, whether the defendant prevails should turn not on any inquiry into whether the defendant was actually motivated by that reason (or any other), but instead on whether the reason stated is "objectively reasonable under the circumstances." 93 F.3d at 835; Pet. App. at 49a. Once the defendant states a constitutionally permissible reason, "only an

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Silberman's approach is different from the five judges who specifically join Judge Williams as to a clear and convincing the standard of proof, Judge Silberman expressly states that Judge Williams' approach is preferable to that of Judge Edwards' opinion. 93 F.3d at 833; Pet. App. at 45a. Furthermore, Judge Silberman would clearly agree with Judge Ginsburg that discovery into subjective motivation prior to summary judgment must be limited.[6/] Apparently for those reasons, Judge Silberman has called his opinion "concurring," rather than stating that he is simply "concurring in the

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[5/](...continued)
objective inquiry into the pretextuality of the reason is allowed." *Id.* at 834; Pet. App. at 46a. Such an objective inquiry is "without regard to [the defendant's] actual intent." *Id.* at 83a; Pet. App. at 50a. The factfinder instead asks whether a hypothetical official would have been acting reasonably under the circumstances shown by the plaintiff if such an official were motivated by that reason in those circumstances. *Id.* at 835; Pet. App. at 49a. To avoid summary judgment, the plaintiff must create a dispute of fact about whether a hypothetical official could have acted reasonably if he had acted from the reason posited and the official's actual subjective motivation is irrelevant.

However, Judge Silberman would also permit defendants to establish immunity, even if their actual reason was not objectively reasonable, "if they are able to prove that their actual reason was legitimate." *Id.* at 836; Pet. App. at 50a. He does not say whether actual motivation could be raised on summary judgment, or if, given "objective pretextuality," it must be resolved by trial.

[6/]Judge Silberman states that he agrees with Judge Williams as to the limited extent to which discovery concerning state of mind is permitted (*i.e.*, to establish what the defendant knew, not why he acted). *Id.* at n.9 ("I . . . agree that a plaintiff is entitled to discovery for certain other purposes. Judge Williams' Op. at 820-21.")

judgment."

d. Except to the extent that it concurs that official immunity must be resolved on summary judgment (93 F.3d at 849, Pet. App. at 82a), Judge Edwards' opinion is limited to "concurring in the judgment to remand." 93 F.3d at 847; Pet. App. at 78a. Judge Edwards criticizes the "clear and convincing" standard for proving motive in these cases as threatening "a devastating impact on potential plaintiffs who already face substantial burdens in attempting to pursue civil rights claims." 93 F.3d at 850; Pet. App. at 86a. He argues that there is no precedent in this Court authorizing such a standard (*id.* at 853; Pet. App. at 91a-92a); that no other court of appeals has adjusted the burden of proof in motive-based tort cases (*id.* at 852 & n.7; Pet. App. at 88a & n.7); and that there is insufficient empirical evidence that "government officials . . . are being subjected to intolerable litigation burdens from intent-based civil rights suits or that district court judges are routinely permitting frivolous claims to go forward." *Id.* at 852; Pet. App. at 90a; footnote omitted. However, Judge Edwards argues that the plaintiff's specific factual allegations in this case are sufficient to withstand a motion for summary judgment. *Id.* at 853; Pet. App. at 92a.

ARGUMENT

There is no need for the Court to review at this time the new solution the District of Columbia Circuit has devised for the vexing question of how claims of official immunity should be treated where government officials are sued personally for motive-based constitutional torts. The circuit's solution -- carefully limiting discovery prior to summary judgment and requiring that impermissible motive be shown on summary judgment by clear and convincing evidence--is a new approach to a problem that has been troubling the circuits

for nearly 15 years. See the plurality opinion 93 F.3d at 817-818, Pet. App. at 7a-11a, and Judge Edwards' opinion at 847-848, 851 n.7; Pet. App. at 80a-82a, 88a, n.7. It is a solution that has much to recommend it. It responds directly to the costs to effective government that *Harlow* teaches are ordinarily entailed by judicial inquiries into motive--namely, unavoidable and potentially broad-reaching discovery and the inability to resolve insubstantial claims short of trial. It makes eminent sense here, promising a likely resolution of this clearly insubstantial (and apparently contrived) claim short of trial.

The Court should give the courts of appeals an opportunity to consider how well this solution works in other developed factual contexts. The very fact that the courts of appeals have struggled with this issue for so long without reaching a clearly satisfactory resolution strongly suggests that a new approach, such as that which has emerged in this case, should be subjected to significant testing--both by seeing how it works in a variety of contexts, and by the scrutiny of other appellate courts--before this Court accepts or rejects it.

There is no real need for the Court to preclude such testing at this time. The D.C. Circuit's resolution is so new that there is now no significant conflict between the circuits.

1. As shown in the Statement (11-12 above), the opinions below do yield two principles for cases of this kind which the district court must treat as governing (and is in fact treating as such[7]). They are 1) raising to clear and convincing the burden of proof that plaintiffs must meet to overcome an assertion of qualified immunity in motive-based

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[7]See *Byrd v. Moseley*, 942 F.Supp. 642 (D.D.C. 1996)(treating the clear and convincing standard as governing).

constitutional tort cases, and 2) limiting discovery to evidence which plaintiff can show a) is likely to support the specific factual allegations that undergird his bad motive claim, and b) will enable him to carry his clear and convincing burden of proof.[N]

Even if there were no "governing law" of the circuit, however, that would not constitute a reason for this Court to undertake to review this case now. Rather, that would suggest even more strongly that the courts of appeals should be given a further opportunity to attempt to fashion a satisfactory solution.

In any event, it is absolutely clear that Judge Silberman's position --that the question on summary judgment should only be the "objective reasonableness" of the motive stated for the challenged conduct -- is not governing law; no other judge joined his opinion. Accordingly, there is no basis for petitioner's second "Question[] Presented."

2. The *in banc* rulings below represent a significant advance concerning the vexing question of official immunity for motive-based constitutional torts. The courts of appeals have been struggling with the question since at least *Hobson*

[N]Judge Silberman is the decisive sixth vote below. His opinion makes the position of Judge Ginsburg governing because 1) on burden of proof, he expressly states his preference for Judge Williams' (and Ginsburg's) resolution to that of the five judges who join in Judge Edwards' opinion; 2) on discovery, Judge Ginsburg's opinion is a subset of Judge Silberman's (Judge Silberman, like Judge Williams, would preclude discovery regarding motive prior to summary judgment; Judge Ginsburg would permit it in limited circumstances); and 3) Judge Silberman stated that his opinion was "concurring," rather than "concurring in the judgment."

v. Wilson, 732 F.2d 1 (D.C. Cir. 1984). Most of the appellate decisions prior to the decision below have focused on whether, to foreclose such a defense, a plaintiff with a motive-based tort claim must plead specific facts. See the cases discussed in Judge Edwards' opinion below, 93 F.3d at 851 n.7; Pet. App. 88a n.7. To the extent such approaches contemplate resolution by motion to dismiss, they operate to exclude discovery. However, they constitute a significant departure from the regime of "notice pleading" established by the Federal Rules of Civil Procedure. See *Kimberlin v. Quinlan*, 6 F.3d 789, 803-804 & n.4 (D.C. Cir. 1993) *vacated and remanded*, ___ U.S. ___, 115 S. Ct. 2552 (1995) (Edwards, J., dissenting).

In addition, an approach which relies on pleading requirements and resolution by motion to dismiss is not well-adapted to distinguish claims that are insubstantial from those that are not. This difficulty led the D.C. Circuit to hold that a plaintiff must assert or produce evidence of a certain kind -- direct, rather than circumstantial -- to overcome an official's assertion of qualified immunity. See the plurality opinion below, 93 F.3d at 818; Pet. App. at 10a. In the decision below, the D.C. Circuit has abandoned that approach.

As then-Judge Ruth Bader Ginsburg recognized in *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1434-1438 (D.C. Cir. 1987), a more direct response to *Harlow's* concerns about discovery and trying insubstantial claims is to limit discovery and to adjust the rules on summary judgment. However, other than the discussion in *Martin*, the opinions below constitute the only extended discussion we know of as to precisely how and why each of these should be done. *Martin* led to a detour by the D.C. Circuit on the now-abandoned "direct evidence" approach. See the plurality opinion, 93 F.3d at 817-818; Pet. App. at 9a-11a. Perhaps

the most helpful discussion elsewhere, in *Elliott v. Thomas*, 937 F.2d 338, 344-345 (7th Cir. 1991), has been characterized as "cryptic" on crucial issues. See Judge Silberman's opinion, 93 F.3d at 833; Pet. App. at 45a.

3. The governing principles of this case are a direct and narrow response to the concerns informing *Harlow*. The difficulty of terminating insubstantial claims of subjective intent without trial is directly addressed by requiring a plaintiff to make a clearer showing that a defendant has acted with a proscribed motive. The burdens of discovery are addressed by requiring a plaintiff to make a special showing to justify it: that what the plaintiff has in hand shows a reasonable likelihood that the discovery sought will produce evidence sufficient to support his factual allegations and that, so supported, his specific allegations will establish his claim. Ginsburg opinion, 93 F.3d at 841; Pet. App. at 63a-64a.

Neither of these solutions is particularly novel. As Judge Williams points out (93 F.3d at 822-823; Pet. App. at 18a-19a), such an adjustment to the burden of proof has been effected in a variety of circumstances where the ordinary preponderance standard has been deemed insufficiently protective of important public policies. Nor is a policy-based limitation of discovery, defeasible on a special showing, unusual. See *Hickman v. Taylor*, 329 U.S. 495, 510-512 (1947), and its progeny and the resulting 1970 amendment to Fed R. Civ. P. 26(b)(3).[9/]

[9/]Furthermore, Judge Ginsburg is surely right that the fact that Fed. R. Civ. P. 56(f) invests the district courts with discretion as to when to permit discovery that a party asserts it needs to oppose summary judgment does not authorize the court to ignore the public policy concerns that arise when discovery is sought to establish a public

(continued...)

These solutions seem sensibly to accommodate the need to provide a money remedy for motive-based constitutional torts, on the one hand, and the interference with effective government caused by permitting judicial inquiry into subjective motivation, on the other. A modestly enhanced burden of proof for the plaintiff is justified on the inarguable ground that "unconstitutional motive is . . . easy to allege and hard to disprove." Plurality opinion, 93 F.3d at 821; Pet. App. at 25a. Certainly this litigation provides strong proof of that proposition.

The notion that Ms. Britton would try in 1989 to punish petitioner Crawford-El for speaking to the press in 1986 and 1988 by routing his boxes via his brother-in-law is so unlikely as to be fairly characterized as "absurd." Judge Henderson's opinion, 93 F.3d at 845; Pet. App. at 35a. Indeed, there is no reason to doubt Judge Silberman's contention that, not long ago, any American judge or lawyer would have been incredulous to hear that such a case could plausibly be brought in federal court. 93 F.3d at 829; Pet. App. at 92a. Nevertheless, Judge Edwards' opinion insists that this case must survive summary judgment and apparently needs to be tried. See Judge Edwards' opinion, 93 F.3d at 853; Pet. App. at 92a. If cases like this one need to be tried, then the costs to which the government will be subject--in burdens on both defendant executive officials, and on the courts--will be very great indeed. *Harlow* will have no meaning where motive-based constitutional torts are involved. There will be an incentive for potential plaintiffs to multiply lawsuits because, after the first one, they can credibly charge

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[9/](...continued)
official's subjective intent. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975) (discretion must be exercised in light of relevant public policies).

any defendant with retaliation for any subsequent, arguably adverse treatment. Needless to say, such a result will provide a powerful lever for prisoner litigants, like petitioner, to use to harass and intimidate their keepers.

4. Although the principles that emerge from the D.C. Circuit's resolution of this case are a rational response to the threats to effective government *Harlow* sought to protect against, and seem sensible as applied to the facts of this case, the Court should permit them to be further tested before deciding whether they should govern all assertions of qualified immunity in motive-based constitutional tort cases. The formula "clear and convincing evidence" will only acquire meaningful content when applied in developed, concrete circumstances. After there is experience in applying it, the Court can assess with much more assurance whether it may have the "devastating impact" predicted by Judge Edwards, or whether it will effectively weed out only claims, like petitioner's, that are clearly lacking in merit and costly to effective government.

Further experience may also show whether these principles work, or may need adjustment or elaboration, in various contexts. Judge Silberman points out (93 F.3d at 836; Pet. App. at 51a), for example, that in many cases, the fact that defendant has acted in part from a proscribed motive does not end the inquiry, but only launches further inquiry to assess the relative importance of proscribed and justifiable motives. At least one court of appeals has struggled with an assertion of qualified immunity in one of these "mixed motive" cases. *Foy v. Holston*, 94 F.3d 1528, 1534-1536 (11th Cir. 1996). The court of appeals there suggested that, at least where it is clear that the defendants acted in part from a motive which provides an overriding justification for the conduct at issue (there, responding to credible evidence that

child abuse was taking place), the fact that the defendants may also have acted from an impermissible motive (there, bias against plaintiff's religious practices) can be deemed irrelevant. *Id.* at 1535 & nn.8, 9, *citing Mt. Healthy v. Doyle*, 429 U.S. 274 (1979). There should be an opportunity to assess whether and how the principles developed below might apply to such situations and others.

5. There is no compelling reason for this Court to attempt to resolve these questions definitively at this time. The principles elaborated below are sufficiently new so that other courts of appeals have not had the opportunity to scrutinize them in any meaningful way.[10] The only appellate decision we have found that has arguably rejected the approach below is that in *Grant v. City of Pittsburg*, 98 F.3d

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[10]Most of the prior cases cited by Judge Edwards, 93 F.3d at 851, n.7; Pet App. at 88a, n.7, concern the amount of specificity required in pleadings, and do not involve summary judgment at all. Several of those that do address summary judgment standards can be read to suggest that an enhanced summary judgment standard should be employed. See, *e.g.*, *Blue v. Koren*, 72 F.3d 1075, 1085 (2nd Cir. 1995) (referring to a "heightened evidentiary standard," and rejecting on policy grounds reliance on circumstantial evidence arguably probative of retaliatory intent--that following the plaintiff's victory over the government in administrative proceedings, plaintiff was subjected to a rigorous investigation); *Branch v. Turnell*, 937 F.2d 1382, 1388 (9th Cir. 1991) (using the formulation that the opponent of summary judgment must make a "substantial showing"). Others, which seem to say that the opponent need only create a dispute of relevant fact, have involved situations where the opponent has produced strong evidence of improper motive. See *e.g.*, *Walter v. Morton*, 33 F.3d 1240, 1243 (10th Cir. 1994). None of these cases focuses, specifically on whether the plaintiff's burden of proof to overcome an assertion of immunity is preponderance of the evidence or some higher standard.

116, 126 (3rd Cir. 1996). There referring to the plurality opinion in this case, the court agreed with "a reasonable limitation on discovery," but rejected "a heightened summary judgment standard." *Id.*

However, the Third Circuit did not examine summary judgment principles in cases of this kind in any developed factual context,[11/] nor did it mention the clear and convincing standard of proof.[12/]

We submit that the new approach that the D.C. Circuit has evolved should be subjected to more exacting and extensive scrutiny before this Court definitively resolves the question of what a plaintiff must show to overcome an assertion of qualified immunity in a motive-based constitutional tort case and how he may go about doing so.

[11/]The Third Circuit's ruling was entirely in the abstract, since its holding was that the district court had not adequately identified the facts necessary for it to resolve the matter. *Id.* at 17[illegible].

[12/]The Third Circuit only mentioned the "direct evidence" rule and cites the plurality opinion below only to a page (93 F.3d at 817; Pet. App. at 7a-9a) discussing the development of that now-abandoned approach.

CONCLUSION

The petition should be denied.

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